IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 803 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE C.K.BUCH

and

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

STATE OF GUJARAT

Versus

LALSINH PITHUJI

Appearance:

MR KC SHAH, APP for Appellant-State

MR PRAFUL J BHATT for Respondent No.1, 2, 3, 4, 5,6,7

CORAM : MR.JUSTICE C.K.BUCH

and

MR.JUSTICE H.H.MEHTA

Date of decision: 14/02/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE C.K.BUCH)

1. This is an acquittal appeal preferred by the State of Gujarat under sec.378 of CrPC against the judgment and order of acquittal dated 18.5.1985 passed by the ld. Addl. Sessions Judge, Mehsana in Sessions Case No. 19/85. Respondents are the original accused and all of them came to be tried for the offences punishable under sections 302 R/w sections 149 of IPC, sections 143, 147, 148,323, 324 & 325 of IPC and sec.135 of B.P.Act. While acquitting the accused, vide very judgment, ld.Addl. Sessions Judge, Mehsana convicted accused no.4 for the offence punishable under sec.324 of IPC and ordered that accused no.4 be released on probation of good conduct on his executing a bond of Rs. 1000/ and a solvent surety of like amount for a period of 2 years to appear and receive sentence when called upon during such period and in the mean time to keep the peace and be of good behaviour, and on a condition that accused no.4 shall pay a sum of Rs.250/ as the amount of compensation to the victim Bijuben Galabsing. Similarly, ld.Addl. Sessions Judge, Mehsana convicted accused no.6 for the offence punishable under sec.325 of IPC and ordered that accused no.4 be released on probation of good conduct on his executing a bond of Rs. 2000/ and a solvent surety of like amount for a period of 2 years to appear and receive sentence when called upon during such period and in the mean time to keep the peace and be of good behaviour, and on a condition that accused no.6 shall pay a sum of Rs.500/ as the amount of compensation to the injured witness Rameshji Galabji. Ld. APP Mr. K.C.Shah appearing for the appellant is not able to say positively as to whether the convict accused nos. 4 & 6 had preferred any appeal. From the ordersheet and record available to us for perusal, we can say that it does not reflect as to filing of any appeal by accused nos. 4 & 6 against the order of their conviction. It is likely that since they were ordered to be released on probation, they might not have opted to prefer an appeal against the order of conviction.

2. It is the case of the prosecution that accused nos. 1 to 5 and the prosecution eye-witnesses examined by the prosecution and the deceased Ramsing Galabji were staying in the same Maholla at village Anodi, Ta: Vijapur. That on the fateful day of 24.9.1984, at about 2.00 P.M., incident had taken place. According to the prosecution, respondents accused formed unlawful assembly armed with deadly weapons like dharia, sticks and sword and had gone to the flour-mill of deceased Ramsing

situated in the same locality with an intention to commit murder of Ramsing Galabji. Complainant Laxmanji Jaguji, after the incident, had lodged complaint before the police stating that when deceased Ramsing was sitting under the roof of his flour-mill and was taking meals, at that time, accused no.1 Lalsing Pithuji had asked him as to why he was talking about his character and commenting on his character publicly ? At that point of time, accused no.1 was armed with dharia and on the subject, there was exchange of words and during that time, accused no.1 inflicted dharia blow. There was "Maramari" between accused no.1 and the deceased. Accused no.2 who was also with accused no.1 armed with dharia, had also inflicted dharia blow on the head of the deceased Ramsing. Because of injury, there was profused bleeding from the head of deceased Ramsing. Meanwhile, prosecution witnesses Bajuben, Pradhanji, Rameshji and one Vajiben had arrived there and accused no.4 had inflicted blow by sword on the head of Bajuben and accused no.6 had inflicted stick blow on Pradhanji and Rameshji and accused no.3 had inflicted stick blow on the hand of Vajiben and thereafter all the accused had fled away from the place of incident. As deceased Ramji had sustained serious injuries, P.W. Jawansing arranged for a vehicle from village Mahudi and Ramsing was taken to the hospital at Mansa, but ultimately injured Ramsing succumbed to the injuries sustained by him. FIR recorded on the strength of the complaint of Laxmanji Jaguji is produced at exh.28. On different dates, accused persons were arrested by the investigating agency. Accused no.1 Laluji @ Lalsing Pithuji had also sustained serious injury on the head. At the conclusion of investigation, police chargesheeted accused persons for the aforesaid offences. Ld. Addl. Sessions Judge, Mehsana, at the conclusion of the trial, acquitted all the accused persons as aforesaid vide judgment and order dated 18.5.1985. However, vide very same judgment, accused no.4 & 6 came to be convicted as aforesaid.

3. Ld. APP Mr.K.C.Shah has mainly argued on the grounds mentioned in the memo of appeal and has tried to point out the errors committed by the ld. trial Judge. He has submitted that the ld. trial Judge ought to have held all the respondents guilty as they were members of unlawful assembly. Motive is satisfactorily established and there was motive for all the accused to assault deceased Ramsing. Ld. trial Judge has materially erred in accepting the theory of private defence pleaded by the accused. Non-explanation of the injuries found on the body of accused no.1 is improperly magnified by the ld. trial Judge. When respondents were responsible for the

attack, sustention of injuries by some of the accused would not give rise to the theory of private defence. There are ample circumstances to show that the accused were assailants and, therefore, the cannot plead for private defence. Mr. Shah has alternatively argued that if this Court finds that element of unlawful assembly was missing when the incident had taken place, even then the accused nos. 1 & 2 could have been held guilty individually for their murderous attack on Ramsing.

4. We have considered the entire oral as well as documentary evidence led by the prosecution. After careful consideration of the order of acquittal recorded by the ld. Addl. Sessions Judge, we are of the view that meticulous efforts have been made by the ld. trial Judge in appreciating the evidence led by the prosecution. Ld. trial Judge has referred material contradictions found in the evidence of injured eye-witnesses Bajuben and Rameshji Galabji. Injuries sustained by these two injured eye-witnesses could have been inflicted in a quarrel subsequent to the main incident which has resulted into the injuries on the head of deceased Ramsing. Ld. trial Judge, dividing nature of evidence led by the prosecution in different categories, has concluded that the totality of evidence does not inspire any confidence at all. On careful consideration of evidence of each eye-witness examined by the prosecution, an impression has emerged that all these persons must have reached to the place of incident after the actual quarrel between accused no.1 and the deceased. Ld. trial Judge has observed in paras-27 & 28 of his judgment to the effect that widow of the deceased Ramsing examined at exh.33, deposed that at the time of incident, she was taking meal in her kitchen.Flour-mill is situated on the front portion whereas house is situated on the backside of flour-mill in the wada. She had come out from the kitchen on hearing hubbub and she found Rameshji, Pradhanji and Motising sitting near her house and she had seen her husband lying injured on the cot. Evidence of Rameshji, Pradhanji and Motising is also considered by the ld. trial Judge. P.W.7 Motising Laxmainsing Exh.34 was the accused in cross case being Sessions Case No. 20/85. So, evidence of the persons who were accused in the cross case, needs close scrutiny and the ld. trial Judge has elaborately brought out material contradictions from the depositions of these witnesses.

5. Considering the various decisions of this Court and the Apex Court, ld. trial Judge has held that non-explanation of the injury found on the person of the

accused no.1 was a material suppression by the prosecution witnesses and the same goes adverse to the credibility of these witnesses. Ld. trial Judge has quoted relevant portion of the decision of the Apex Court in the case of Laxmi Singh & Ors. v/s State of Bihar, reported in AIR 1976 P.2263 and has rightly held that the ratio of said decision squarely applies to the facts of the present case.

6. We have considered the injury certificate issued by the doctor who had examined accused no.1 on 24.9.1984 at about 6.20 P.M. Investigating Officer has admitted in his evidence exh.46 that accused no.1 had sustained injuries in the very incident and the persons responsible for the injuries caused to accused no.1, undoubtedly were chargesheeted. Injury Certificate exh.49 reveals that accused no.1 had sustained following injuries :-

1. Incised wound on lt. parital region shape 4 1/2" x 1/2" in size bone deep, bleeding scalp flap can be elevated with one piece covering of brain seen.

2. Incise wound on rt. suprascapular region 4" x 1/2" in size, muscle exposed bleeding.

3. C.L.W. on 1st web on rt. hand (shape 3" in length).

It is in evidence of the doctor that there was profused bleeding from the scalp and scalp flap elevated with bone piece covering of brain was seen. Considering all the three injuries and especially injury nos. 1 & 2, it can be inferred that had this blow been inflicted on the head of accused no.1 first in point of time, then he could not have inflicted blow with the force as alleged in retaliation, on the head of the deceased. Likewise, had accused no.1 had given blow to the deceased in first point of time, then he could not have received injury on his head at the hands of the deceased which is found on his head. We agree that there is some evidence as to motive or cause leading to the quarrel, but the fact remains that the prosecution has suppressed the genesis of the crime and the manner in which entire incident had happened. So, this material infirmity in the prosecution evidence had left no room for the ld. trial Judge,but to record finding of acquittal. Merely because more than one persons are named in FIR or there are more than one injured eye-witnesses, the Court cannot presume, in

absence of any cogent evidence, that there was an assembly which can be termed as an "unlawful assembly". Careful reading of entire set of evidence shows two different pictures and prosecution has tried to club two separate incidents as one and, therefore, it seems that material confusion has cropped up.

7. The ld. trial Judge has accepted the theory of private defence and in view of the nature of injuries found on the person of accused no.1, ld. trial Judge has rightly held that right of private defence was available to the accused side and even according to us, this is not a case wherein it can be inferred and held that accused persons have exceeded the right of private defence.

8. We are hearing appeal against the order of acquittal. Mere because there is some scope to record the finding other than the one which is recorded by the ld. trial Judge, appellate Court should be slow in doing so. We are not supposed to re-write judgment interpreting evidence in different way and that too after a lapse of period of 15 to 16 years and in view of settled legal position, in absence of any cogent and convincing evidence, the finding of acquittal recorded by the ld. trial Judge cannot be reversed. As we are in agreement with the findings recorded and reasonings given by the ld. trial Judge for recording acquittal, we do not see any need to supplement our own reasons for the same.

8. For the reasons aforesaid, there is no substance in this appeal and it requires to be dismissed. Hence, appeal is dismissed. Impugned judgment of acquittal is hereby confirmed. Accused are on bail, their bail bonds stand discharged.

14.02.2001 [C.K. BUCH, J]

[H.H. MEHTA, J]

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